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No. 01-1332

In The

Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATION ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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The briefs in opposition all but ignore the grave First Amendment questions presented by the decision below. Instead, they rest on the proposition that satellite carriers, like cable operators, must swallow the "bitter" must-carry restriction with the "sweet" statutory copyright license. But the satellite medium should not be forced to swallow the bitter medicine of must-carry because it, unlike the cable medium, is not afflicted with the disease of "bottleneck monopoly power." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) (*Turner I*).

As the Fourth Circuit recognized, *see* App. 45a, 53a-56a, its decision upholding the carry-one, carry-all provision of SHVIA substantially extended this Court's reasoning in *Turner I* and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). Only Justice Breyer opined that a speech-restrictive cure could be imposed absent dysfunction in the marketplace of ideas whenever Congress seeks to promote a diversity of speakers in the market. This Court has always held that, absent such market dysfunction, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

And even if a majority of this Court were to adopt Justice Breyer's view that preservation of a multiplicity of speakers, standing alone, justifies a legislative restriction on speech, the Constitution does not allow Congress simply to "posit the existence of the disease sought to be cured," *Turner I*, 512 U.S. at 664 (citation and internal quotation omitted), and to impose the restriction without a showing that the disease actually exists and the restriction is likely to cure it. Yet the decision below imposes the forced-carriage medicine on satellite carriers on the basis of Congress' diagnosis of another patient; the Fourth Circuit justified the restriction on satellite speech "by considering the cumulative effects of cable and satellite without making fine distinctions regarding their relative contributions in creating those effects." App. 48a. There is no evidence whatever supporting

the proposition that carry-one, carry-all will preserve even a single broadcast station that otherwise would go dark.

1. Respondents attempt to dissuade the Court from reviewing these important questions of First Amendment law (and thus permanently insulate SHVIA from review by this Court) primarily by contending that the conditional nature of the restriction makes it no restriction at all. Fed. Resp. Br. 11. The fact that the restriction is not absolute, but merely operates as a condition upon the grant of a valuable government license, does not make it any less a restriction on speech. *See Turner I*, 512 U.S. at 636 ("by exercising editorial discretion over which stations or programs to include in its repertoire," cable operators engage in speech) (citation and internal quotation omitted). Thus, it does not follow, as respondents argue, that petitioners' real complaint is with the constitutionally unexceptionable copyright law, not with the condition Congress attached to the statutory copyright license.

This Court has long recognized that "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In particular, "[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Id.* Thus, respondents are wrong when they derisively claim "[p]etitioners' disappointment over the particular form of corporate welfare Congress decided to give them does not implicate the First Amendment," NAB Resp. Br. 27, just as it clearly would be wrong to dismiss a welfare mother's First Amendment claim were Congress to condition her benefits upon her agreement to kneel before golden idols.

Respondents attempt to skirt this settled precedent by claiming that SHVIA's forced carriage regime merely "define[s] the scope" of the benefit contained in the statutory license. NAB Resp. Br. 26-27; Fed. Resp. Br. 12. But this Court has already rejected this overly clever construct: "Congress cannot recast a condition . . . as a mere definition of its

program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 547 (2001). To the same end, respondents mischaracterize SHVIA as having created a "market-by-market license" that imposes no speech restriction whatsoever, but simply provides a license to use a "market-copyright." Fed. Resp. Br. 12. But SHVIA quite unambiguously provides satellite carriers with a right to retransmit the signal of "a television broadcast *station*," not a market, 17 U.S.C. § 122(a), App. 336a (emphasis added), and then conditions the exercise of that right upon the requirement that the satellite operator carry free of charge *any additional station* that requests carriage, 47 U.S.C. § 338(a), App. 344a-45a.[1] Moreover, respondents' construct is untenable on its own terms. While a day of programming compiled and aired by a particular station may be copyrighted, *see NAB v. Copyright Royalty Tribunal*, 675 F.2d 367, 377-78 (D.C. Cir. 1982), there is no such thing as a "market copyright" encompassing all of the programming broadcast by every television station in a geographic market.

Intervening respondents attempt to analogize this case to this Court's decisions upholding limitations upon benefits granted by Congress in the exercise of its spending and taxation powers. NAB Resp. Br. 25-27. However, this is not a case, as in *Rust v. Sullivan*, 500 U.S. 173 (1991), where the government has chosen to subsidize particular speech, while withholding financial support from speech with which it does not agree. *See Velasquez*, 531 U.S. at 541. Rather, SHVIA's forced carriage requirement seeks to leverage Congress' *regulatory* power over copyright to force private speakers (satellite companies) to carry speech (unpopular independent stations) that they do not wish to carry. This case is therefore

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[1] Thus, the Solicitor General's statement that "Congress did not create an unrestricted statutory license to retransmit a single station in a given market and then attach restrictions on free expression as conditions to that new 'right,' " Fed. Resp. Br. 12, cannot be squared with the plain language of SHVIA.

governed not by *Rust*, but by the cases holding that government cannot condition a particular license on the licensee's accepting a restriction on its editorial discretion or free speech rights. *See generally Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 559 (1995).

Indeed, this Court's decision less than a month ago in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002), clearly demonstrates the flaw in respondents' logic. In *Thompson*, Congress had the unquestioned power to prohibit pharmacists from compounding drugs – just as Congress has the unquestioned power in this case, through copyright law, to prevent petitioners from carrying all local television stations. Yet the Court never considered forgoing First Amendment analysis of the ban on advertising compounding services even though the restriction upon pharmacists' speech was merely a limitation upon the grant of "an enormously valuable and extraordinary benefit in the form of an exemption from generally applicable" food and drug laws. *See* Fed. Resp. Br. 11 (describing SHVIA's statutory copyright license).

2. This Court held in the *Turner* cases that Congress may restrict speech when necessary to preserve a multiplicity of broadcast stations threatened by the market power and economic incentives of cable operators to deny carriage for anticompetitive reasons. This case presents the question whether the same result obtains in the absence of the market dysfunction that drove the decision in *Turner*.[2]

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[2] Respondents briefly argue that this question was in fact resolved by the majority in *Turner II*, *see* Fed. Resp. Br. 17-18; NAB Resp. Br. 17-18, but as we have already demonstrated, *see* Pet. 19-20, this contention is without merit. Only Justice Breyer was willing to uphold the must-carry obligation without regard to "[w]hether or not the statute does or does not sensibly compensate for some significant market defect." 520 U.S. at 226 (Breyer, J., concurring in part). No other Justice endorsed that view.

Five Justices reached this question in Turner II. The four dissenters concluded that any interest in protecting a multiplicity of broadcast stations, "apart from [a threat of] anticompetitive conduct," is "heavily content based." 520 U.S. at 233 (O'Connor, J., dissenting). Absent market dysfunction, "[m]ust-carry is . . . justified as a way of preserving viewers' access to a Spanish or Chinese language station or of preventing an independent station from adopting a home-shopping format," and thus "should be subject to strict scrutiny, which they surely fail." *Id.* at 234-35 (O'Connor, J., dissenting). Like the dissenters, Justice Breyer disclaimed the "anticompetitive rationale" relied upon by the other four Members of the majority, *id.* at 225 (Breyer, J., concurring in part), but unlike the dissenters, he concluded that advancing the governmental interest in diversity, standing alone, justified the carriage restriction.

Respondents concede that SHVIA's forced-carriage regime was motivated by a desire "to protect less watched, more vulnerable stations." NAB Resp. Br. 22. Nevertheless, they argue that this purpose is not content-based because there is no difference between the content of the programming offered on network affiliates and that offered on less watched stations: "[m]ajor network affiliates and their independent counterparts alike broadcast dramas, situation comedies, and feature films." *Id.* This is equivalent to arguing that there would be no content-based difference drawn by a law distinguishing between "national political parties" and "minor parties" because both offer candidates for office who give public policy speeches. The whole notion that the government has an interest in promoting a "multiplicity" of viewpoints rests upon the proposition that the *content* of the "diverse" sources of programming that would be lost without forced-carriage is indeed "diverse," or *different*.

In *Turner I*, the Court held that cable must-carry was not subject to strict scrutiny only because Congress had an additional, overarching purpose – namely, to correct the market dysfunction flowing from cable's anticompetitive power. *See, e.g.*, 512 U.S. at 649 ("Congress designed the must-carry provisions not to promote speech of a particular content, but

to prevent cable operators from exploiting their economic power to the detriment of broadcasters"). The Court emphasized that the cable must-carry rule corrected this market dysfunction by discriminating between mediums – in favor of *broadcast stations* and against anticompetitive *cable stations*. The analysis would have been very different had the forced-carriage rule discriminated between different speakers in the same medium solely in order to equalize the power of diverse voices in the marketplace. It was on this basis that the Court distinguished *Buckley*: because the restriction there "was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Id.* at 658.

Here, the speaker-based discrimination is analogous to that in *Buckley*, and distinct from that in *Turner*. SHVIA's forced-carriage rule is not intended to correct a market dysfunction by favoring one medium (broadcast) over another (cable), as was the case in *Turner*, but rather is designed to promote *independent broadcasters* at the expense of *network affiliate broadcasters* in what would otherwise be a properly functioning marketplace of ideas. And while respondents argue that SHVIA's forced-carriage rule does not depend upon the *particular* content aired on any *particular* station, Fed. Resp. Br. 13, this is no different from the fact that the expenditure limits at issue in *Buckley* did not depend upon the *particular* speech of *particular* wealthy individuals.[3]

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[3] Respondents make this point in an attempt to distinguish the "speech-trigger" in this case from that struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Turner I*, the Court distinguished *Miami Herald* by pointing out that the cable must-carry rule did not arise "by reason of the . . . *stations* the cable operator has selected or will select." 512 U.S. at 644 (emphasis added). SHVIA falls on the *Miami Herald* side of this line because its forced-carriage rule is triggered by a satellite carrier's decision to carry a broadcast station in a given market. As the discussion in the text demonstrates, it does not matter that the speech-trigger in SHVIA is indifferent to the content of

3. Respondents do not deny that the SHVIA is not "justified by the special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner I*, 512 U.S. at 661. Rather, they attempt to avoid the constitutional peril arising from that fact by claiming that SHVIA furthers the other two of the three "interrelated" interests relied upon in *Turner* – preserving free television and promoting a multiplicity of voices. Even if this Court were to hold, for the first time, that such interests justify restrictions on speech absent market dysfunction, respondents cannot explain how they could be advanced here. It is undisputed that satellite does not pose a threat to the "preservation" of even a single broadcast station, so that the interest of preserving free television simply cannot be served by SHVIA's forced-carriage as it was by cable must-carry. *Cf. Turner I*, 512 U.S. at 666 and *Turner II*, 520 U.S. at 195 (holding that the government must show that "significant numbers" of stations would fail absent must-carry). Respondents likewise do not deny that the Fourth Circuit circumvented this shortcoming in the government's case by refusing to apply "*Turner II*'s substantial deterioration standard," holding that it "does not work here . . . ." App. at 45a. But as this Court held last month, the government bears the burden of demonstrating that its restrictions on speech are actually necessary to advance the interest it seeks to achieve. "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson*, 122 S. Ct. at 1507.

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the station chosen (just as the restriction in *Buckley* was indifferent to the content of the speech of the wealthy). SHVIA was clearly designed to ensure that whenever a satellite company chose to carry a station that by definition is "popular," it would also be required to carry *all* "unpopular stations" offered in that local market.

Instead, respondents argue that the "cumulative impact" of cable and satellite poses a "significantly *greater* threat to free broadcast television." Fed. Resp. Br. 18; NAB Resp. Br. 23-24. Remarkably, respondents advance this argument without bothering to acknowledge, much less address, the wholly unprecedented nature of justifying imposition of a speech restriction on one industry by "attributing" the findings underlying a *separate* statute regulating speech in a *separate* medium. *See* Pet. 26-30. It will *always* be possible to "lump" together one group of speakers in a particular marketplace so as to demonstrate that those speakers, when viewed as a whole, threaten to "crowd out" the losers in that marketplace. If the "cumulative impact" argument is accepted, this Court's insistence upon narrow tailoring will be rendered meaningless, and any speaker in any market can be forced "to carry" the speech of the less popular "losers" in that market.

Second, respondents argue that Congress may justify restrictions on speech whenever they "minimize the unintended, disruptive effects of" its own regulation of the television marketplace. Fed. Resp. Br. 16 (quoting Pet. App. 51a). As an initial matter, there is no indication whatever that Congress sought to advance this supposed interest with the "carry-all" restriction on petitioners' speech. *See, e.g., Thompson*, 122 S. Ct. at 1507 ("we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational").[4] In any event, even

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[4] Respondents elsewhere cite a passage from the Conference Report referring to Congress' interest in "ensur[ing] that satellite would be an 'effective competitor' to cable." Fed. Resp. Br. 19. But the cited portion of the Report addressed only the statutory copyright license granted to satellite carriers to enable them to compete with cable operators; the Committee discussed the "carry-all" condition several pages later, and in the course of that discussion made no mention of imposing the carriage restriction in order to prevent satellite from obtaining a competitive advantage over cable. *See* App. 361a-63a.

if this interest were not merely a post hoc rationalization, the notion that Congress may restrict speech in order to counteract the natural functioning of the marketplace of speech whenever its own regulation has an impact on that market is breathtaking. The Solicitor General's unprecedented submission in this regard would grant government *carte blanche* to impose speech restrictions, for little that government does has *no* impact upon the functioning of speech marketplaces. This Court has never hinted that the First Amendment would countenance this sweeping new authority.

Respondents also seek to justify burdening satellite with a forced-carriage regime, lest satellite obtain "terms of competition that are significantly more advantageous than those offered to cable operators." Fed. Resp. Br. 19. But whenever SHVIA's legislative history refers to promoting competition or leveling the playing field, it does so solely with reference to its desire to *assist the satellite industry* to compete against the monopolistic power of cable by granting the statutory copyright license. *See* Pet. 27 n.9. Moreover, as the Court of Appeals acknowledged, App. 23a-24a, SHVIA's forced-carriage provision, unlike the Cable Act, effectively *excludes* satellite carrier from many playing fields by limiting the number of markets that satellite may serve.

4. The Solicitor General argues that "the courts could not give petitioners the relief that they ultimately seek" because the "carry-all" condition imposed in the Communications Act of 1934, 47 U.S.C. § 338, is not severable from statutory copyright license granted in the Copyright Act, 17 U.S.C. § 122. Fed. Resp. Br. 19. Both the premise and the conclusion are wrong. As to the premise, SHVIA enacted the statutory license and the forced-carriage rule by amending two separate statutes, appearing in two different Titles of the U.S. Code, *each of which* contains an explicit severability clause. *See* 47 U.S.C. § 608; Pub. L. No. 94-553, § 115, 90 Stat. 2541, 2602; *Reno v. ACLU*, 521 U.S. 844, 882-83 (1997). As to the conclusion, even if the forced-carriage requirement were not severable, the federal courts

would in no way be disabled from granting petitioners the relief they seek: a declaration that the carry-all restriction on their speech violates the First Amendment and an injunction against its enforcement. This Court granted this relief in analogous circumstances in *Thompson* even though the issue of severability had been finally resolved against plaintiffs. 122 S. Ct. at 1503.

5. There is no dispute that this case presents the only opportunity this Court is likely ever to have to review SHVIA's forced-carriage requirement, for the entire satellite television industry nationwide is bound by the judgment below. Respondents' implicit suggestion that this Court await a circuit split on the issue, *see* NAB Resp. Br. 15-17, is therefore tantamount to asking the Court to defer the Judicial Department's last word on the constitutionality of SHVIA to the Fourth Circuit. We respectfully submit that where Congress has claimed the power to restrict speech in circumstances significantly beyond what this Court authorized in the *Turner* cases, it is for this Court alone to determine whether its Act comports with the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 23, 2002

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